

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAMONT L. TANNER,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

3:13-cv-00435-HDM-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

July 31, 2014

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for remand and/or reversal (#13).¹ Defendant filed a cross-motion to affirm (#18). Plaintiff replied (#19). For the reasons set forth below, the court recommends that plaintiff's motion for remand and/or reversal be denied and that defendant's cross-motion to affirm be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Lamont L. Turner ("plaintiff") was a fifty-seven-year-old man with at least a high school education on the alleged disability onset date of January 28, 2007 (Administrative Record ("AR") 28, 38). On March 14, 2008, he filed an application for disability insurance benefits under Title II and an application for supplemental security income under Title XVI. *Id.* at 145. The Commissioner denied plaintiff's applications initially and on reconsideration. *Id.*

¹ Refers to the court's docket number.

1 On October 20, 2009, plaintiff and his attorney appeared at a hearing before Administrative
2 Law Judge (“ALJ”) Mark C. Ramsey. *Id.* at 57-101. The ALJ followed the five-step sequential
3 process for evaluating disability claims, set forth in 20 C.F.R. § 404.1520, and issued a written
4 decision on May 20, 2010, finding plaintiff had “not been under a disability” pursuant to the Social
5 Security Act at any time from the alleged onset date through the date of the ALJ’s decision. *Id.* at
6 142-155. Plaintiff appealed, and the Appeals Council granted the request for review and remanded
7 the matter with instructions to obtain evidence from a medical expert—if one was available—to
8 clarify the nature and severity of plaintiff’s mental impairment. *Id.* at 160-164.

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11 On June 13, 2012, plaintiff and his attorney appeared at the remand hearing before ALJ
12 Eileen Burlison. *Id.* at 102-137. ALJ Burlison issued an unfavorable decision on August 30, 2012.
13 *Id.* at 24-40. Plaintiff filed a request for review with the Appeals Council on October 23, 2012,
14 which was denied on June 26, 2013. *Id.* at 22, 1-14. Thus, the ALJ’s decision became the final
15 decision of the Commissioner.

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17 On September 18, 2013, having exhausted all administrative remedies, plaintiff, through
18 counsel, filed a complaint for judicial review (#3). Plaintiff argues that the ALJ improperly rejected
19 the treating physician’s opinion regarding the severity of plaintiff’s mental impairments, and the
20 decision lacks the support of substantial evidence in the record (#13, pp. 4-11). Accordingly,
21 plaintiff asks the court to reverse or remand the ALJ’s decision. *Id.* at 1-2.

22 23 **II. STANDARD OF REVIEW**

24 The court must affirm the ALJ’s determination if it is based on proper legal standards and the
25 findings are supported by substantial evidence in the record. *Stout v. Comm’r Soc. Sec. Admin.*, 454
26 F.3d 1050, 1052 (9th Cir. 2006); *see also* 42 U.S.C. § 405(g) (“findings of the Commissioner of
27 Social Security as to any fact, if supported by substantial evidence, shall be conclusive”).
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1 “Substantial evidence is more than a mere scintilla but less than a preponderance.” *Bayliss v.*
 2 *Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (internal quotation marks and citation omitted).
 3 “It means such relevant evidence as a reasonable mind might accept as adequate to support a
 4 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v.*
 5 *NLRB*, 305 U.S. 197, 229 (1938)); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).

7 To determine whether substantial evidence exists, the court must look at the record as a
 8 whole, considering both evidence that supports and undermines the ALJ’s decision. *Orteza v.*
 9 *Shalala*, 50 F.3d 748, 749 (9th Cir. 1995) (citation omitted). “However, if evidence is susceptible of
 10 more than one rational interpretation, the decision of the ALJ must be upheld.” *Id.* at 749 (citation
 11 omitted). The ALJ alone is responsible for determining credibility and for resolving ambiguities.
 12 *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

14 The initial burden of proof rests upon the claimant to establish disability. 20 C.F.R. §
 15 404.1512(a); *Howard v. Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986) (citations omitted). To meet
 16 this burden, a plaintiff must demonstrate an “inability to engage in any substantial gainful activity by
 17 reason of any medically determinable physical or mental impairment which can be expected . . . to
 18 last for a continuous period of not less than 12 months . . .” 42 U.S.C. § 423 (d)(1)(A).

20 III. DISCUSSION

21 A. Five-Step Sequential Process

23 The Commissioner has established a five-step sequential process for determining whether a
 24 person is disabled. 20 C.F.R. § 404.1520; *see also Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987).
 25 If at any step the Social Security Administration (SSA) can make a finding of disability or
 26 nondisability, a determination will be made and the SSA will not further review the claim. 20 C.F.R.
 27 § 404.1520(a)(4); *see also Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

1 In the first step, the Commissioner determines whether the claimant is engaged in
2 “substantial gainful activity”; if so, a finding of nondisability is made and the claim is denied. 20
3 C.F.R. § 404.1520(a)(4)(i), (b); *Yuckert*, 482 U.S. at 140. If the claimant is not engaged in
4 substantial gainful activity, the Commissioner proceeds to step two.

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6 The second step requires the Commissioner to determine whether the claimant’s impairment
7 or combinations of impairments are “severe.” 20 C.F.R. § 404.1520(a)(4)(ii), (c); *Yuckert*, 482 U.S.
8 at 140-41. An impairment is severe if it significantly limits the claimant’s physical or mental ability
9 to do basic work activities. *Id.* Basic work activities are “the abilities and aptitudes necessary to do
10 most jobs[.]” which include: “(1) [p]hysical functions such as walking, standing, sitting, lifting,
11 pushing, pulling reaching, carrying, or handling; (2) [c]apacities for seeing, hearing, and speaking;
12 (3) [u]nderstanding, carrying out, and remembering simple instructions; (4) [u]se of judgment; (5)
13 [r]esponding appropriately to supervision, co-workers and usual work situations; and (6) [d]ealing
14 with changes in a routine work setting.” 20 C.F.R. § 404.1521. If a claimant’s impairment is so
15 slight that it causes no more than minimal functional limitations, the Commissioner will find that the
16 claimant is not disabled. 20 C.F.R. § 404.1520(a)(4)(ii), (c). If, however, the Commissioner finds
17 that the claimant’s impairment is severe, the Commissioner proceeds to step three. *Id.*

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19 In the third step, the Commissioner determines whether the impairment is equivalent to one
20 of a number of specific impairments listed in 20 C.F.R. pt. 404, subpt. P, app.1 (“Listed
21 Impairments”). 20 C.F.R. § 404.1520(a)(4)(iii), (d). The Commissioner presumes the Listed
22 Impairments are severe enough to preclude any gainful activity, regardless of age, education, or
23 work experience. 20 C.F.R. § 404.1525(a). If the claimant’s impairment meets or equals one of the
24 Listed Impairments, and is of sufficient duration, the claimant is conclusively presumed disabled. 20
25 C.F.R. § 404.1520(a)(4)(iii), (d). If the claimant’s impairment is severe, but does not meet or equal
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1 one of the Listed Impairments, the Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

2 In step four, the Commissioner determines whether the claimant can still perform “past
3 relevant work.” 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f). Past relevant work is that which a claimant
4 performed in the last fifteen (15) years, which lasted long enough for him or her to learn to do it, and
5 was substantial gainful activity. 20 C.F.R. § 404.1565(a). The ALJ reviews the claimant’s “residual
6 functional capacity” (“RFC”) and the physical and mental demands of the work previously
7 performed. *See id.*; *see also Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). RFC is what the
8 claimant can still do despite his or her limitations. 20 C.F.R. § 404.1545. In determining RFC, an
9 ALJ must assess all evidence, including the claimant’s and others’ descriptions of limitation, and
10 medical reports, to determine what capacity the claimant has for work despite the impairments. *See*
11 20 C.F.R. § 404.1545(a).

14 At step four, the ALJ may consider any of the claimant’s daily activities that “may be seen as
15 inconsistent with the presence of a condition which would preclude all work activity.” *Curry v.*
16 *Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990) (upholding denial of disability benefits where claimant
17 could “take care of her personal needs, prepare easy meals, do light housework, and shop for some
18 groceries”); *see also Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (upholding denial of
19 benefits based in part on determination that claimant performed daily activities that were
20 transferrable to a work setting); compare *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)
21 (concluding activities not transferrable to work setting); *Reddick v. Chater*, 157 F.3d 715, 722 (9th
22 Cir. 1998) (claimant should not be “penalized for attempting to lead [a] normal [life] in the face of
23 [her] limitations”); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 2007) (noting that “many home
24 activities are not easily transferable to what may be the more grueling environment of the workplace,
25 where it might be impossible to periodically rest or take medication”).
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1 A claimant can return to previous work if he or she can perform the “actual functional
2 demands and job duties of a particular past relevant job” or “[t]he functional demands and job duties
3 of the [past] occupation as generally required by employers throughout the national economy.”
4 *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation and citation omitted).

6 If the claimant can still do past relevant work, then he or she is not disabled for purposes of
7 the Act. 20 C.F.R. § 404.1520(f); *see also Berry*, 662 F.3d at 131 (“Generally, a claimant who is
8 physically and mentally capable of performing past relevant work is not disabled, whether or not he
9 could actually obtain employment.”).

11 If, however, the claimant cannot perform past relevant work, the burden shifts to the
12 Commissioner to establish, in step five, that the claimant can perform work available in the national
13 economy. 20 C.F.R. § 404.1520(e), (f); *see also Yuckert*, 482 U.S. at 141-142, 144. If the claimant
14 cannot do the work he or she did in the past, the Commissioner must consider the claimant’s RFC,
15 age, education, and past work experience to determine whether the claimant can do other work.
16 *Yuckert*, 482 U.S. at 141-42. The ALJ may meet this burden either through the testimony of a
17 vocational expert or by reference to the Grids. *Tackett v. Apfel*, 180 F. 3d 1094, 1100 (9th Cir.
18 1999).

20 “The [G]rids are matrices of the four factors identified by Congress—physical ability, age,
21 education, and work experience—and set forth in rules that identify whether jobs requiring specific
22 combinations of these factors exist in significant numbers in the national economy.” *Lockwood v.*
23 *Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (internal quotation and citation
24 omitted). The Grids place jobs into categories by their physical-exertional requirements, and there
25 are three separate tables, one for each category: sedentary work, light work, and medium work. 20
26 C.F.R. Part 404, Subpart P, Appx. 2, § 200.00. The Grids take administrative notice of the numbers
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1 of unskilled jobs that exist throughout the national economy at the various functional levels. *Id.*
2 Each grid has various combinations of factors relevant to a claimant's ability to find work, including
3 the claimant's age, education and work experience. *Id.* For each combination of factors, the Grids
4 direct a finding of disabled or not disabled based on the number of jobs in the national economy in
5 that category. *Id.*

7 The ALJ may not rely solely on the Grids unless they accurately and completely describe the
8 claimant's abilities and limitations. *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985) (citation
9 omitted). The ALJ must take the testimony of a vocational expert where the claimant suffers from
10 non-exertional limitations that are "sufficiently severe so as to significantly limit the range of work
11 permitted by his exertional limitation." *Hoopai*, 499 F.3d at 1076 (internal quotation and citation
12 omitted). Further, where the ALJ finds that a nonexertional limitation alone is severe [at step two of
13 the sequential process] (absent any exertional limitation); the ALJ is not required to seek the
14 assistance of a vocational expert at step five unless the nonexertional limitation(s) are "significant,
15 sufficiently severe, and not accounted for in the grid[s]." *See id.* at 1076.

18 If, at step five, the ALJ establishes that the claimant can do other work which exists in the
19 national economy, then he or she is not disabled. 20 C.F.R. § 404.1566. Conversely, if the ALJ
20 determines the claimant unable to adjust to any other work, the claimant will be found disabled. 20
21 C.F.R. § 404.1520(g); *see also Lockwood*, 616 F.3d at 1071; *Valentine v. Comm'r of Soc. Sec.*
22 *Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). However, "[a] finding of 'disabled' under the five-step
23 inquiry does not automatically qualify a claimant for disability benefits." *Bustamante*, 262 F.3d at
24 954.

1 **B. ALJ's Findings**

2 The ALJ found that plaintiff suffers from the severe impairments of degenerative disc
3 disease; degenerative joint disease; history of post-traumatic stress disorder; depression and
4 adjustment disorder with mixed emotional features, otherwise described as adjustment disorder with
5 mixed anxiety and depression and mood disorder due to general medical conditions (AR 30). The
6 ALJ determined that plaintiff has past relevant work as a delivery driver, which is considered a
7 medium, semi-skilled position with a specific vocational preparation ("SVP") of 3. *Id.* at 37. The
8 ALJ also found that plaintiff retains the RFC to perform medium work with the limitations of only
9 occasional posturals, avoidance of hazards and no more than brief and superficial interaction with
10 the general public. *Id.* at 37.

13 The ALJ considered plaintiff's age, education, work experience and RFC, and found that
14 plaintiff can perform jobs that exist in significant numbers in the national economy. *Id.* at 38.
15 Accordingly, the ALJ determined that plaintiff "has not been under a disability," as defined in the
16 Social Security Act. *Id.* at 39. Specifically, the ALJ made the following findings:

- 18 1. The claimant meets the insured status requirements of the Social Security Act through June
19 30, 2009.
- 20 2. The claimant has not engaged in substantial gainful activity since January 28, 2007, the
21 alleged onset date (20 C.F.R. § 404.1571 *et seq.*, and § 416.971 *et seq.*).
- 22 3. The claimant has the following severe impairments: degenerative disc disease; degenerative
23 joint disease; history of post-traumatic stress disorder; depression and adjustment disorder
24 with mixed emotional features, otherwise described as adjustment disorder with mixed
25 anxiety and depression and mood disorder due to general medical conditions (20 C.F.R. §§
26 404.1520(c) and 416.920(c)).
- 27 4. The claimant does not have an impairment or combination of impairments that meets or
28 medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart
P, Appendix 1, (20 C.F.R. §§§§§§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925,
and 416.926).

5. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform medium work as defined in 20 C.F.R. § 404.1567(c) except no more than occasional climbing, balancing, stooping, kneeling, crouching, or crawling. The claimant must avoid hazards, working at heights or operating dangerous, moving, machinery. Further, the claimant is to have no more than brief and superficial interaction with the public.
6. The claimant is capable of performing past relevant work as a Delivery Driver and Assembler. This work does not require the performance of work-related activities precluded by the claimant's residual functional capacity. (20 C.F.R. §§ 404.1565 and 416.965).
7. The claimant was born on December 22, 1949, and was 57 years old, which is defined as an individual of advanced age, on the amended disability onset date (20 C.F.R. §§ 404.1563 and 416.963).
8. The claimant has at least a high school education and is able to communicate in English (20 C.F.R. §§ 404.1564 and 416.964).
9. Considering the claimant's age, education, work experience, and residual functional capacity, there are other jobs that exist in significant numbers in the national economy that the claimant also can perform (20 C.F.R. §§§§ 404.1569, 404.1569(a), 416.969, and 416.969(a)).
10. The claimant has not been under a disability, as defined in the Social Security Act, from January 28, 2007, through the date of this decision (20 C.F.R. §§ 404.1520(f) and 416.920(f)).

Id. at 30-39.

C. RFC Finding

Plaintiff challenges the ALJ's RFC finding by asserting that she failed to adequately articulate her reasons for discounting the opinions of his treating physician and lacked substantial evidence to discount those opinions (#13, pp. 4-6). Defendant argues that the ALJ discussed the treating physician's opinion in detail and offered valid reasons to reject it, all of which were supported by the record and by the law (#18, p. 4).

Generally, an ALJ should give more weight to the opinion of a treating source than to the opinion of non-treating doctors. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995); *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir.1987). "At least where the treating doctor's opinion is not contradicted by another doctor, it may be rejected only for 'clear and convincing' reasons. *Lester*,

1 81 F.3d at 830 (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)); *Embrey v. Bowen*,
2 849 F.2d 418, 422 (9th Cir. 1988). “Even if the treating doctor’s opinion is contradicted by another
3 doctor, the Commissioner may not reject this opinion without providing ‘specific and legitimate
4 reasons’ supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830 (quoting *Murray v.*
5 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

7 However, “[i]t is clear that it is the responsibility of the ALJ, not the claimant’s physician, to
8 determine residual functional capacity.” *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).
9 The ALJ must also consider the opinions of state agency consultative examiners. *See Orn v. Astrue*,
10 495 F.3d 625, 632 (9th Cir. 2007). When the opinions of treating and examining doctors conflict, it
11 is the ALJ’s duty to resolve the conflicts. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).
12 “[W]hen an examining physician provides ‘independent clinical findings that differ from the
13 findings of the treating physician,’ such findings are ‘substantial evidence.’” *Orn v. Astrue*, 495
14 F.3d 625, 632 (9th Cir. 2007); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (an
15 examining physician’s opinion “alone constitutes substantial evidence, because it rests on [the
16 doctor’s] own independent examination of [the claimant]”).

19 Further, the ALJ must also consider the findings of fact and opinions of non-examining state
20 agency medical and psychological consultants and other program physicians and psychologists, who
21 are experts in Social Security disability programs. Social Security Ruling (“SSR”) 96-6p, 1996 WL
22 374186. Such consultants are “highly qualified physicians and psychologists who are experts in the
23 evaluation of the medical issues in disability claims under the Act . . . they consider the medical
24 evidence in disability cases and make findings of fact on medical issues, including, but not limited
25 to, the existence and severity of an individual’s impairment.” *Id.* The ALJ may rely on opinions
26 from state agency reviewers if those opinions are well-supported and consistent with the record as a
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1 whole. *Id.* “[O]pinions from State agency medical and psychological consultants and other program
2 physicians and psychologists may be entitled to greater weight than the opinions of treating or
3 examining sources.” *Id.*

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5 Here, the ALJ indicated that the medical records reflect that the plaintiff was diagnosed with
6 degenerative disc disease, degenerative joint disease, history of post-traumatic stress disorder,
7 depression and adjustment disorder with mixed anxiety and depression and mood disorder due to
8 general medical conditions, for which he has been undergoing treatment since at least 2007 (AR 30).

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10 The ALJ considered the opinion of John VanBiber, M.D., the plaintiff’s treating physician at
11 the Department of Veterans Affairs. *Id.* at 34-37. Dr. VanBiber filled out a mental RFC
12 questionnaire and indicated that the plaintiff suffers from post-traumatic stress disorder, depression,
13 and a mood disorder. *Id.* at 705-710. Based on a treating relationship since 2006, Dr. VanBiber
14 opined that the plaintiff should not obtain or maintain any type of employment. *Id.* at 716. In 2009,
15 Dr. VanBiber opined in a medical source statement that the plaintiff was unable to meet competitive
16 standards for many of the mental functioning abilities and aptitudes needed to perform even
17 unskilled work. *Id.* at 707. Additionally, in 2010, Dr. VanBiber stated, “It continues to be my
18 opinion that this veteran will have significant difficulty with any type of new stressful situations
19 such as new social contacts, being told what to do by authority figures, being in situations where he
20 feels confined.” *Id.* at 716.

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23 The ALJ accorded partial weight to Dr. VanBiber’s opinions that the plaintiff has more than
24 minimal functional limitations with regard to social functioning. *Id.* at 35. However, the ALJ
25 accorded little weight to his opinion that the plaintiff is completely unable to work, or even that his
26 social functioning imitations are marked because she found that opinion “inconsistent with the
27 objective evidence of the record.” *Id.* More specifically, the ALJ concluded that Dr. VanBiber’s
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1 opinion is inconsistent with his own treatment notes and findings as well as the plaintiff's own
2 reporting of his symptoms. *Id.* at 36. For example, Dr. VanBiber opined the plaintiff was likely to
3 decompensate significantly, posing a danger to himself, if he were exposed to added stressors. *Id.* at
4 716-718. However, the plaintiff consistently underwent unremarkable mental status examinations
5 with Dr. VanBiber, showing no evidence of suicidal or homicidal ideation, and Dr. VanBiber
6 indicated in his notes that plaintiff is not at a high risk for suicide. *Id.* at 766, 773, 930, and 972.
7 Additionally, the ALJ notes that "the medical record contains over five years of evidence that
8 claimant is able to, on an extremely frequent basis, interact and respond appropriately and effectively
9 with numerous physicians and hospital staff, request medication refills in person and over the
10 telephone, attend appointments, and submit to numerous confining diagnostic tests such as MRIs."
11 *Id.* at 35, (citing medical records at 464, 511, 537-555, and 768). The ALJ concluded that plaintiff's
12 ability to maintain those activities is inconsistent with Dr. VanBiber's opinion the plaintiff has
13 significant difficulty with any type of new, stressful situation such as new social contacts, interacting
14 appropriately with the public, or being in situations where he feels confined. *Id.* at 705-710.

18 The ALJ also considered the opinion of state agency psychological consultant, James Derbin,
19 M.D., who reviewed the record and concluded that plaintiff's mental impairments were not severe.
20 *Id.* at 446-459. The consultant based his opinion on a review of the medical records showing that
21 plaintiff's daily activities revealed that most of his impairments stemmed from physical issues. *Id.* at
22 458. The medical records indicated that he was generally stabilized on his psychiatric medication
23 with limited impairments in his functional activities from his medically determinable psychiatric
24 issues. *Id.* The ALJ gave no weight to this opinion because "it is inconsistent with the record as a
25 whole, including the opinion of the claimant's treating psychiatrist." *Id.* at 34.
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1 With respect to plaintiff's physical impairments, the ALJ considered the report of
2 consultative examiner Steven E. Gerson, D.O., (Doctor of Osteopathic Medicine). *Id.* at 460-467.
3 Dr. Gerson concluded that plaintiff is capable of a reduced range of medium work with various
4 limitations. *Id.* He based this opinion on plaintiff's subjective complaints of pain as well as his
5 physical examination of the plaintiff. Dr. Gerson found that plaintiff had a full range of motion in
6 his neck, a full strength bilateral hand grasp, negative straight leg raising test bilaterally, intact
7 bilateral fine motor coordination, and slightly reduced ranges of motion in his bilateral hips. *Id.*
8 Additionally, Dr. Gerson noted that plaintiff had no difficulty getting on and off the examination
9 table, only mild difficulty tandem walking and walking on his toes and heels, and moderate
10 difficulty squatting and rising. *Id.* The ALJ accorded partial weight to Dr. Gerson's opinion that
11 plaintiff is capable of a reduced range of medium work to the extent it is consistent with the ALJ's
12 residual functional capacity determination. *Id.* at 33.

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15 Based on all three reports, the ALJ concluded that plaintiff has the residual functional
16 capacity to perform medium work as defined in 20 C.F.R. § 404.1567(c) except no more than
17 occasional climbing balancing stooping, kneeling, crouching, or crawling, must avoid hazards,
18 working at heights or operating dangerous, moving, machinery. *Id.* at 32. He is further limited to no
19 more than brief and superficial interaction with the general public. *Id.*

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22 Plaintiff bears the burden of proving disability. *See* 20 C.F.R. §§ 404.1512(a), 416.912(a).
23 The ALJ accorded the most weight to the reports of consultative examiner Dr. Gerson and plaintiff's
24 treating physician Dr. VanBiber. The ALJ gave partial weight to both reports to the extent they were
25 consistent with her RFC finding. Plaintiff argues that the ALJ did not properly weigh the opinion of
26 his treating physician. *Id.* at 35-36. A VA determination is ordinarily entitled to great weight.
27 *Berry*, 622 F.3d at 1236; *Valentine*, 574 F.3d at 694-95; *McCartey v. Massanari*, 298 F.3d 1072,
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1 1076 (9th Cir. 2002). However, an ALJ may give less weight to the VA’s decision if the ALJ
2 provides “persuasive, specific, valid reasons for doing so that are supported by the record.” *Berry*,
3 622 F.3d at 1236; *Valentine*, 574 F.3d at 694-95; *McCartey*, 298 F.3d at 1076; *see also Turner v.*
4 *Comm’r of Soc. Sec. Admin.*, 613 F.3d 1217, 1225 (9th Cir. 2010).

5
6 The ALJ in part accorded less weight to Dr. VanBiber’s opinions because she deemed that
7 the doctor relied too heavily on plaintiff’s subjective report of symptoms and limitations and
8 “uncritically accept[ed] as true most, if not all, of what the claimant reported.” *Id.* at 36. The ALJ
9 determined that plaintiff’s self-reported limitations, as well as his descriptions of the sources of those
10 limitations, were not entirely credible and inconsistent with the record as a whole. *Id.* The ALJ
11 noted that plaintiff’s focus at almost every psychotherapy appointment with Dr. VanBiber was on his
12 “wife” who was disabled. *Id.* Dr. VanBiber notes that one of the plaintiff’s only social activities is
13 caring for and interacting with his wife. *Id.* at 783, 898-906, and 972. However, the record as a
14 whole—including a form submitted by the friend in question (*id.* at 288) as well as plaintiff’s
15 statement to consultative examiner Dr. Gerson that he is single (*id.* at 462)—indicates that plaintiff is
16 not now, nor was he ever during the relevant period, married, but instead has a long-time roommate
17 who is a friend but not a significant other. *Id.* at 36, 783, 898, 972, and 1027.

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19 The ALJ also accorded less weight to Dr. VanBiber’s opinions because his own treatment
20 notes, as well as the objective medical evidence in the record, contradict his conclusion that
21 plaintiff’s impairments are so severe as to completely preclude him from working. For example, Dr.
22 VanBiber opined that plaintiff could not work because he was seriously limited in his ability to set
23 goals and get along with co-workers, despite observations in his treatment notes that plaintiff was
24 cooperative and goal-directed. *Id.* at 930, 1018, 1027, 708. Additionally, plaintiff stated in a
25 Function Report for the SSA that he has never been fired or laid off from a job because of problems
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1 getting along with other people. *Id.* at 302. Moreover, Dr. VanBiber opined that plaintiff would be
2 seriously limited in “accept[ing] instructions and respond[ing] appropriately to criticism from
3 supervisors,” but plaintiff himself stated that he gets along “okay” with authority figures. *Id.* at 708,
4 302.

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6 An ALJ may permissibly reject a treating physician’s opinion when that opinion is
7 inconsistent with the physician’s own treatment notes and when the opinion is not supported by
8 clinical findings. *See* 20 C.F.R. §§ 404.1527(c)(3) & (c)(4); *Bray v. Comm’r*, 554 F.3d 1219, 1228
9 (9th Cir. 2009). Here, the ALJ set forth an appropriate basis for according less weight to Dr.
10 VanBiber’s opinions because Dr. VanBiber’s treatment notes, as well as the objective evidence of
11 the record, contradicted the conclusion that plaintiff’s impairments were severe enough to prevent
12 him from working. The court concludes that substantial evidence in the medical records supports the
13 ALJ’s determination that no objective findings support Dr. VanBiber’s conclusions that plaintiff is
14 completely unable to work. Accordingly, the court finds that substantial evidence supports the RFC
15 determination that plaintiff should be limited to medium work with the limitations of only occasional
16 posturals, avoidance of hazards and no more than brief and superficial interaction with the general
17 public, and remand or reversal is not warranted.
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20 IV. CONCLUSION

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22 Based on the foregoing, the court concludes that substantial evidence in the record supported
23 the ALJ’s RFC determination. The court therefore recommends that plaintiff’s motion for remand
24 and/or reversal (#13) be denied and that defendant’s cross-motion to affirm (#18) be granted.

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Local Rule IB 3-2, the parties may file
26 specific written objections to this Report and Recommendation within fourteen days of receipt.
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1 These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation"
2 and should be accompanied by points and authorities for consideration by the District Court.

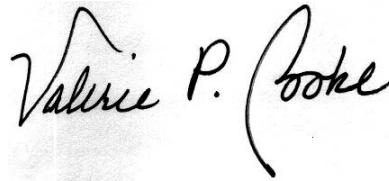
3 2. This Report and Recommendation is not an appealable order and any notice of appeal
4 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.
5

6 **V. RECOMMENDATION**

7 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for remand and/or reversal
8 (#13) be **DENIED** and defendant's cross-motion to affirm (#18) be **GRANTED**.

9 **IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** accordingly
10 and close this case.
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12 **DATED:** July 31, 2014.



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14 **UNITED STATES MAGISTRATE JUDGE**
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